Office - Supreme Court, U.S.
FILED
JUL 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2125

In the Supreme Court of the United States

OCTOBER TERM, 1981

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

STATE OF NEW JERSEY, RESPONDENT

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

COMMONWEALTH OF PENNSYLVANIA, RESPONDENT

BRIEF AMICUS CURIAE OF THE STATE OF MARYLAND IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STEPHEN H. SACHS
Attorney General

PAUL F. STRAIN
Deputy Attorney General

ELLEN M. HELLER
Assistant Attorney General

JEANNE D. HITCHCOCK
Assistant Attorney General

7 North Calvert Street
Baltimore, Maryland 21202
(301) 576-6300

E. STEPHEN DERBY
Counsel of Record

PAUL A. TIBURZI

1100 Charles Center South
36 South Charles Street
Baltimore, Maryland 21201
(301) 539-2530

The Daily Record Co., Baltimore, MD 21202

TABLE OF CONTENTS

	PAGE
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	4
CONCLUSION	7

TABLE OF AUTHORITIES

Cases:

New Jersey v. Hufstedler, 662 F.2d 208 (3d Cir. 1981) 1-4, 6

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) 3, 6, 7

West Virginia v. Secretary of Education, 667 F.2d 417 (1981) 2-6

Statutes:

Elementary and Secondary Education Act of 1965:

Title I, 20 U.S.C. (Supp. IV) 2701 *et seq.* 1

20 U.S.C. § 1234d (Supp. III 1979) 3

20 U.S.C. § 2835(b) (Supp. IV) 7

Miscellaneous:

47 Fed. Reg. 6685-86 (February 16, 1982) 2

4th Cir. R. 18 2

Supreme Court Rule 17 4

No. 81-2125

In the Supreme Court of the United States

OCTOBER TERM, 1981

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

STATE OF NEW JERSEY, RESPONDENT

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

COMMONWEALTH OF PENNSYLVANIA, RESPONDENT

BRIEF AMICUS CURIAE OF THE STATE OF MARYLAND IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The State of Maryland, by its Attorney General, submits this brief amicus curiae in support of the Secretary of Education's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in *New Jersey v. Hufstedler*, 662 F.2d 208 (3d Cir. 1981).

INTEREST OF AMICUS CURIAE

The State of Maryland is acutely interested in this Court's disposition of the Secretary of Education's (the "Secretary") petition. Like Respondents New Jersey and Pennsylvania, Maryland participates as a grantee in the funding program provided by Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. (Supp. IV) 2701 *et seq.* ("Title I"). After two final audit determinations of the Department of Education's Assistant Secretary for Elementary and Secondary Education concerning Title

I funds spent during fiscal years 1975-1978, the Secretary ordered Maryland to refund $10,875,333 in funds allegedly spent in violation of Title I or its implementing rules and regulations. Maryland received written notice of those determinations on August 3 and October 7, 1981.

On October 7 and November 6, 1981, the Education Appeal Board of the Department of Education (the "Board") accepted Maryland's applications for review of the final audit determinations. *See* 47 Fed. Reg. 6685-86 (February 16, 1982). The proceedings before the Board are currently pending.

One of the issues in dispute raised by Maryland in the applications for review is that under the provisions of Title I in effect during the applicable time period, the Secretary had no authority to order Maryland to refund the contested funds. In support of its position on that issue, Maryland cited the decision below, *New Jersey v. Hufstedler,* 662 F.2d 208 (3d Cir. 1981), in which the United States Court of Appeals for the Third Circuit held that the Secretary lacked both statutory authority and a common law right administratively to recoup illegally expended pre-1978 Title I funds.

On October 15, 1981 — just two days after the Third Circuit decided *Hufstedler* — the United States Court of Appeals for the Fourth Circuit issued a decision in direct conflict with the Third Circuit's ruling: *West Virginia v. Secretary of Education,* No. 80-1704 (4th Cir. Oct. 15, 1981). Without oral argument, the Fourth Circuit ruled in an unpublished, per curiam opinion that the Secretary had both statutory and common law authority to order, after administrative proceedings, West Virginia to repay Title I funds illegally expended before 1978. Under the Fourth Circuit's local rules, the *West Virginia* decision would have had little or no precedential authority had it remained unpublished. *See* 4th Cir. R. 18(c) & (d). However, on

November 16, 1981, the Secretary, by motion, asked the Court to publish its opinion. By a letter dated November 24, 1981, Maryland (which had not previously participated in the appeal) requested the Court to reaffirm its decision not to publish the opinion. Maryland suggested that it would be inappropriate for the *West Virginia* decision to become the law of the Circuit because in rendering that decision the Court had had no opportunity to consider the Third Circuit's analysis of the extent of the Secretary's authority in *Hufstedler* and because neither the parties in their briefs nor the Court in its opinion mentioned this Court's decision in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), in which the Third Circuit found strong support for its decision.

On December 23, 1981, the Court granted the Secretary's motion, and the *West Virginia* decision was published. 667 F.2d 417 (1981). On April 26, 1982, this Court denied West Virginia's motion to direct the Clerk of the Court to accept for filing an untimely petition for certiorari seeking review of the Fourth Circuit's decision.

The Fourth Circuit's ruling in the *West Virginia* case is the law of the Circuit. As such, it may be followed by the Education Appeal Board in the Board's consideration of applications for review filed by states within the Fourth Circuit's jurisdiction. *See* 20 U.S.C. § 1234d (Supp. III 1979) (authorizing appeals from adverse decisions of the Board to the United States Court of Appeals for the Circuit in which the adversely affected party is located). Thus, if the Fourth Circuit's *West Virginia* decision stands, Maryland's position with respect to the Secretary's authority can be expected to be rejected summarily by the Board, and subsequently on appeal to the Fourth Circuit, despite the existence of compelling authority not considered by the Fourth Circuit supporting Maryland's position, namely, this Court's decision in *Pennhurst* and the Third Circuit's decision in *Hufstedler*.

SUMMARY OF ARGUMENT

The Secretary's petition for a writ of certiorari must be granted to resolve the direct conflict between the decisions of the United States Courts of Appeals for the Third and Fourth Circuits with respect to the Secretary's authority to require refunds of misspent Title I funds after an administrative hearing. Unless that conflict is resolved by a definitive ruling from this Court, the Education Appeal Board will be forced to apply inconsistent rules of law in the cases before it involving audit claims of Title I funds received before 1978 and in each appeal of a Board decision to a federal court of appeals that has not yet spoken on the issue, the court will be free to adopt either the Third or the Fourth Circuit's position, thus creating further confusion.

ARGUMENT

Maryland asks the Court to grant the Secretary's petition in order to review and affirm the decision below.

Because the Third Circuit's decision below in *New Jersey v. Hufstedler*, 662 F.2d 208 (3d Cir. 1981), is in direct conflict with the Fourth Circuit's decision in *West Virginia v. Secretary of Education*, 667 F.2d 417 (4th Cir. 1981), one of the "special and important reasons" identified in Supreme Court Rule 17 as supporting the granting of a petition for a writ of certiorari exists in this case. The Secretary's petition gives this Court the opportunity to provide a definitive ruling on the issue that divided the Third and Fourth Circuits, an issue the absence of a clear resolution of which impedes the Secretary's ability efficiently to administer a grant program of vital national importance as well as the States' efforts to implement that program.

Unless the conflict between the Third and Fourth Circuits is resolved, the Education Appeal Board will be

forced to apply one rule of law in reviewing audit determinations involving Title I funds in cases from the states comprising the Fourth Circuit — Maryland, North Carolina, South Carolina, Virginia, and West Virginia — and another in cases from the states comprising the Third Circuit — Pennsylvania, Delaware, and New Jersey. The extent of the Secretary's authority to require states in other circuits to pay refunds of misspent pre-1978 Title I funds after an administrative hearing will not be clear until every other federal court of appeals has ruled on the issue.

Because of the nature of the Fourth Circuit's decision in the *West Virginia* case, the current state of the law is particularly unsatisfactory to Maryland and the other states over which that Court has jurisdiction. As discussed above, the Court decided the case without the benefit of oral argument by counsel and announced its decision in a short per curiam opinion that the Court initially ordered not to be published.

Because the Court's discussion of the Secretary's authority to require refunds of misspent Title I funds after an administrative hearing is very brief — one paragraph — it may be quoted in full:

> "It is also clear that the Board has the authority to order the refund. Section 185(b) of the Act, 20 U.S.C. § 2835(b), grants the Secretary specific authority to require the repayment of funds determined to have been misspent. The Secretary ordered West Virginia to repay the funds in June, 1977; the hearing, although requested in 1977, was not held until 1979 and the decision was reached in 1980. Section 185(b) was enacted in 1978. There is no legislative indication that the authority to order repayment is to be effective only prospectively, and the statute's remedial purposes will be more fully served by applying it retroactively. Even if this were not so, the Secretary can, independently of specific statutory authority,

> recover funds which are granted for specific purposes and misspent in contradiction of those purposes. *See Mt. Sinai Hospital of Greater Miami, Inc. v. Weinberger*, 517 F.2d 329, 337 (5th Cir. 1975) *cert. denied*, 425 U.S. 935, 96 S. Ct. 1665, 48 L. Ed. 2d 176 (1976)."

667 F.2d at 419.

That extract reveals the most troubling aspects of the Fourth Circuit's decision. First, in rendering that decision the Court had no opportunity to consider the Third Circuit's analysis of the extent of the Secretary's authority in *Hufstedler*. Second, neither the parties in their briefs nor the Court in its opinion mentioned this Court's decision in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), in which the Third Circuit found strong support for its decision in *Hufstedler*.

Although Maryland agrees with the Secretary that this Court should review the Third Circuit's decision in *Hufstedler* in order to resolve the circuit conflict, it disagrees with the Secretary's assertion that the Third Circuit's decision should be reversed because the Court misinterpreted controlling legal principles. Unlike the Fourth Circuit's decision in the *West Virginia* case, the Third Circuit's opinion provides a thorough discussion of Title I, its legislative history, and numerous relevant cases and, Maryland submits, reaches the correct conclusion with respect to the Secretary's authority.

Most importantly, the Third Circuit addressed the significance of the *Pennhurst* decision, in which this Court enunciated the principle that the terms and conditions of a federal grant must be set forth clearly and unambiguously in the statute authorizing the grant. *See* 451 U.S. at 15-18. Applying that principle, the Third Circuit ruled that the Secretary lacked specific statutory authority to order the repayment of pre-1978 misspent funds because the only express authorization to recoup was provided in the 1978

amendments to Title I (codified at 20 U.S.C. § 2835(b) (Supp. IV)), amendments which could not be applied retroactively to funds received and spent prior to their effective date. 662 F.2d at 213-14. Completely ignoring *Pennhurst*, the Fourth Circuit relied on those 1978 amendments as the Secretary's statutory authority to order a refund.

CONCLUSION

For the reasons stated, the Secretary's petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN H. SACHS
Attorney General

PAUL F. STRAIN
Deputy Attorney General

ELLEN M. HELLER
Assistant Attorney General

JEANNE D. HITCHCOCK
Assistant Attorney General

E. STEPHEN DERBY
Counsel of Record

PAUL A. TIBURZI

Attorneys for the
State of Maryland,
Amicus Curiae.

July 1982